UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES SAN FRANCISCO BRANCH OFFICE

LOCAL UNION 342 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, Respondent,

Case 20-CB-077499

and

MICHAEL VAIL, an Individual

Shelley Brenner, Esq., for the Acting General Counsel.

Benjamin K. Lunch, Esq.

(Neyhart, Anderson, Flynn & Grosboll) for the Respondent Union.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. This case was tried in San Francisco, California, on August 13 and 14, 2012. The Charging Party, Michael Vail (Vail or the Charging Party), filed the original charge on March 23, 2012, which was later amended on May 25, 2012, and the Acting General Counsel issued the complaint on May 31, 2012. The complaint alleges that Local Union 342 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Respondent or Union) has operated an exclusive hiring hall and provided union members with employment referrals for plumbing and pipefitting work in the Northern California area in an arbitrary and discriminatory manner in violation of Sections 8(a)(3) and 8(b)(1)(A) and (2) of the of the National Labor Relations Act (the Act).

Specifically, the Acting General Counsel alleges that the union, in December 2011,² without first providing Vail with notice of the precise amount of monies Vail owed pursuant to his financial obligations to Respondent and the method by which Vail's financial obligations were calculated,

¹ At trial, the Acting General Counsel proposed amending the complaint once more to amend subpar. 7(e) and to roll what was previously subpars. 7(e) and (f) to become subpars. 7(f) and (g). The Respondent did not object to the new amendments but continued to deny the allegations. Tr. 11-14; GC Exh. 1(j) at 3-4.

² All dates are in 2011 unless otherwise indicated.

attempted to cause and caused Association employer-members not to employ Vail for reasons other than the failure to tender uniformly required initiation fees and periodic dues. (GC Exh. 1(g).³)

The Respondent denies some of the allegations in their entirety and denies that it violated the Act in any respect. (GC Exh. 1(i).)

5

10

15

20

25

30

35

40

At trial, all parties were afforded the right to call, examine and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and to file posthearing briefs. On September 24, 2012, the briefs were filed by counsel for the Acting General Counsel and the Respondent and have been carefully considered. Accordingly, based on the entire record⁴ here, including the posthearing briefs and my observation of the credibility of the several witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Jurisdiction is uncontested. The Respondent admits, and I find, that J. W. McClenahan Company (Employer), a California corporation, with an office and place of business in San Mateo, California, has been engaged as a general contractor in the construction industry doing commercial construction; that as Employer, it, as well as other employers, is party to a collective-bargaining agreement with the Union; that it performed services valued in excess of \$50,000 in States outside California during the past year ending December 31; and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act. (GC Exhs. 1(j) and 1(l); Tr. 20.)

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

The parties further admit, stipulate to, and I find that at all material times since at least July 1, 2009, the Respondent and the Employer, as well as other employers engaged in plumbing, heating and air-conditioning, utility, refrigeration, and/or industrial pipe fitting, through the Northern Mechanical Contractors Association and Industrial Contractors UMIC, Inc. (the Association) engaged in commerce within the meaning of the Act. Also, the parties stipulate and I find that the Respondent and the Association have been parties to a collective-bargaining agreement effective for a period of July 1, 2009, through June 30, 2012 (Agreement), requiring that the Respondent be the exclusive source of referral for employment with the Employer and other employers through the Respondent's employment referral system. I further find that the Respondent, through the operation of its employment referral system, has maintained records of its employment referral system at its facility in Concord, California, and has

³ For ease of reference, testimonial evidence cited here will be referred to as "Tr." (Transcript) followed by the page number(s); documentary evidence is referred to either as "GC Exh." for an Acting General Counsel exhibit, "R. Exh." for Respondent union exhibit; reference to the posttrial briefs shall be "GC Br." for the Acting General Counsel's brief, and "R Br." for Respondent union's brief, followed by the applicable page numbers.

⁴ I hereby correct the transcript as follows: Tr. 68, line 13: "December" should be "February"; Tr. 95, line 24: "pry" should be "probably"; Tr. 171, line 11: "on" should be "an"; Tr. 243, line 8: "date" should be "Dave"; Tr. 265, line 14: "BY MR. LUNCH:" should be "BY MS. BRENNER:"; and Tr. 301, line 13: "out work of the work situation" should be "out-of-work situation."

required its members and those individuals using its employment referral system to report to the Respondent's hiring hall facility on a periodic basis in order to maintain their eligibility for referrals. (Tr. 17-18, 20-21; GC Exhs. 1(j) and 1(l), and GC Exhs. 17-18.)

The parties further admit, stipulate to, and I find that the Agreement described above includes the following union-security provision:

UNION SECURITY – All employees covered by this Agreement must, as a condition of employment, apply for membership in, and become members of, and maintain membership in the Union within eight (8) days under this Master Labor Agreement This Section shall be enforced to the extent permitted by law.

(GC Ex. 17 at 2.)

5

10

15

20

25

30

35

40

45

The parties further admit, stipulate to, and I find that the Agreement described above requires the Respondent to operate an exclusive hiring hall for construction work for plumbers at its facility at 935 Detroit Avenue, Concord, California (hiring hall), where the incidents referred to below occurred from July 1, 2009, through February 2012 and that the Respondent, in fact, runs an exclusive hiring hall. (Tr. 17-18, 35, 164; GC Exhs. 1(j) and 1(l) and 17.) Furthermore, the parties admit, stipulate to, and I find that Respondent's business agents, Derrick Kualapai (Kualapai), David Mann (Mann), and Jay Williams (Williams) and one of its secretaries, Heather Zamora, (Zamora), are agents of Respondent within the meaning of Section 2(13) of the Act. (Tr. 20-21, 299; GC Exhs. 1(j) and 1(l).)

B. The Dispatch Process

Vail has worked as a plumber for approximately 27 years since 1985 and as a journeymen plumber since 1990. (Tr. 33, 170-171.) Vail is also a certified pipefitter and has done pipefitting work under the auspices of the United Association of pipefitters in Illinois within the last 2 years of hearing in this matter. (Tr. 126.) Vail has been a member of the Respondent since 2006 and has been dispatched to jobs from its hiring hall. (Tr. 34-35.) Vail explained that he has received dispatches from the Respondent primarily as a result of being on Respondent's plumbers' out-of-work list which he first signed at the hiring hall in 2006 and has continuously been on the list through at least December 8.5 (Tr. 34-35.)

Mann explained that employers usually call in or fax in requests for workers to the Respondent with the number of workers needed, the type of work, and the location of the job. (Tr. 211.)

Mann worked for the Respondent as a business agent and hiring hall dispatcher from 1999 until his retirement on January 12, 2012. (Tr. 163.) Mann, a former journeyman plumber, handled dispatches primarily from the Union's plumbers' out-of-work list. (Tr. 173.) Mann's duties at the Respondent also included handling grievances that union members brought to his attention. (Tr. 163-164.) Mann and the other business agents at the Respondent report to the Union's business manager, Jay Williams, in 2011 until Mann retired in January 2012. (Tr. 166.)

Out-of-work lists are computer generated approximately twice a month at the Respondent. (Tr. 183; GC Exh. 25.) The lists contain information including a member's position on the list, contact information, handwritten information about dispatches, and their sign-in date for purposes of their rank on the list. (Tr. 190-193 GC Exh. 25.) The lists are revised by the secretaries, including Zamora, who incorporate handwritten marks, crossed-out names, added names, etc. over a 2-week period. (Tr. 186.)

⁵ Vail alleged without substantiation that the Union had placed him on the pipefitters out-of-work list in error for 6 months in April 2010. Tr. 35-36.

The Respondent refers its members to work through the out-of-work list and generally a member is placed on the list when he or she is out of work and progresses up the list when members above them on the list are put to work through a process called dispatch and the Respondent's business agent telephones the worker about a specific job. (Tr. 36, 175, 212.) Union members are given the employer's name and address, the point of contact or foreman at the job with a phone number to call, a show-up time, and an estimate as to the length of the job. (Tr. 36-37.) A dispatch or referral slip reflecting this same information is usually prepared by the assigning business agent, given to a secretary, Zamora in November of 2011, who faxes a copy to the employer, retains a copy, and mails it to the member's address on file with the Union. (Tr. 37, 213-215.)

5

10

15

20

25

30

35

40

45

50

If a member is dispatched to a job that is anticipated to last 80 hours or 14 days, they lose their spot on the out-of-work list and must go to the bottom if they become laid off. (Tr. 37, 176, 270; GC Exh. 17 at 8.) A member may also have their name crossed out on an out-of-work list if they are expelled from the Union. (Tr. 197: GC Exh. 25.) A member must travel to the hiring hall to put his or her name back on the out-of-work list at the bottom after he or she has worked a job that is at least 80 hours in length or at least 14 days' long (a long call), if they quit a job, or if they are is fired from a job. (Tr. 37, 176-177, 270.)

A member maintains his or her position on the out-of-work list if the dispatched job is expected to be less than 80 hours or less than 14 days (a short call), and if the member is laid off and doesn't quit rather than being fired from a job. Infra. Vail usually calls the hiring hall to notify when a job is over and whether it was a long or short call job. (Tr. 37-38.)

A member who is dispatched to a job that is anticipated to be a long call will normally have their name crossed off the out-of-work list. (Tr. 177, 195 270.) A business agent like Mann is authorized to cross a member's name off the list for this purpose or direct a secretary to do the same. (Tr. 180-183.) If, however, the anticipated long call job turns out to be a short call job due to layoff, the member can simply call the hiring hall to alert it to the layoff and the hiring hall will return the name to the list to retain the member's place on the list before the cross-out. (Tr. 178-180, 273.) Mann's usual custom and practice was to ask a secretary to place the member's name back on the out-of-work list if the anticipated long call turned out to be a short call due to layoff which would not require a member's physical presence at the hiring hall to get back on the list. (Tr. 179-180, 270, 273.) A member may also call in to have their name crossed off the out-of-work list and transferred to the "will notify" list if they become ill, go on vacation, or want an extended leave from the out-of-work list. (Tr. 181-182, 194-195.)

C. Vail's Interaction with the Respondent Prior to November 2011

Vail admitted working a long call job with O'Brien Mechanical from 2006–2009 and during that time period Vail paid his union dues in a timely manner. (Tr. 98.) Vail estimates that after his job with O'Brien Mechanical he has worked a total of 30 days from dispatch jobs he obtained from the hiring hall and that since 2009 he has been unable to pay his union dues in a timely manner. (Tr. 98-106.)

Vail admitted being behind and owing union dues once or twice before November 2011 but he was never denied a dispatch or was removed from the out-of-work list for failure to pay dues prior to December 2011. (Tr. 76-77, 92.) Vail further admitted being more than 3 months behind on his union dues obligations before December and Vail was suspended by the Union but not denied a dispatch. (Tr. 77.) He recalled receiving mailed reminder notices from the Respondent that give notice that a member is late in paying their dues and asks that they be paid or that the member will be suspended. (Tr. 78.) At the time of trial, Vail estimated that he had been suspended by the Union for not paying dues two or three times—the last time being in February 2012 or another time thereafter. (Tr. 78.)

Each reminder notice states that dues are \$24 per month, and notes that if dues are not paid suspension will result, with an additional \$50-reinstatement fee. Each reminder notice also notes the number of months Vail is delinquent. Each suspension notice states that Vail is suspended and must pay all back dues plus a \$50-reinstatement fee to return to good standing. The suspension notices also state that failure to pay back dues and the reinstatement fee will result in ineligibility for dispatch. The suspension notices also state that failure to pay dues will result in removal from the out-of-work list. This occurs when the member becomes expelled after incurring 6 months of unpaid dues. The UA Constitution and the union bylaws require expulsion after 6 months of nonpayment of dues. (GC Exhs. 18 and 24.) In addition, the bylaws provide that suspended members shall be removed from any job.

10

15

20

25

5

Vail also recalled being suspended and receiving written notice within a few days thereafter in June, July, and August 2011 for nonpayment of union dues. (Tr. 81-82, 85; GC Exh. 8.) Vail also recalled receiving notice that he was delinquent in payment of his union dues in May 2011. (Tr. 83; GC Exh. 8.) Vail also recalled receiving the notices of May and June a few days after they are dated but the July and August notices later because he changed his address from San Mateo to Burlingame, California, without giving the Respondent notice that his address had changed until the Respondent's health and benefits office mailed Vail a change of address form to update his address to the correct address in Burlingame. (Tr. 84-86, 142-143; GC Exh. 8.) Sometime in August before they were overdue 6 months, Vail paid his overdue back union dues of \$194 (\$24 x 6 + \$50) with a money order via certified mail to the Respondent in August after receiving his suspension notice. (Tr. 86-88.)

At all relevant times, in 2011, Vail's sign-in date on the plumbers' out-of-work list remained December 6, 2010. (Tr. 198, 202, 219, 221-225, 229, 231-232; GC Exh. 25 at 13, GC Exhs. 26-35.) In addition, Vail's name appeared on the plumbers' out-of-work lists consistently at higher positions from May 10 through July 20 and from August 17 through December 9. Infra.

Vail was dispatched to jobs by the Union on January 16, 2007, January 1, 2009, June 14, July 15, October 1, August 1, August 22, October 3, October 19, November 9, and December 9, 2010. (Tr. 55-56, 133, 226-228, 232-233, 236, 294-295, 303-304; R Exhs. 2 and 3)

30

35

40

50

Vail recalled being dispatched by the Respondent to jobs with Western Digital, Merelich Mechanical, Southland Industries and Kinetics, and Thermal Mechanical at Washington Memorial in Fremont, California, during the period of May through August when his dues were delinquent. (Tr. 77-78, 89-91; GC Exh. 10.) Vail was also dispatched to a job with F.W. Spencer in August and he says that he was prepared to go work on the job at the Kaiser Oakland 12 story location but Vail did not work on that job due to a water skiing accident where he broke his ribs and was out of work on disability until October 3. (Tr. 104-106, 233-234; GC Exh. 15.) On October 19, Vail was dispatched to another F.W. Spencer job but was laid off on October 27 for lack of production by the employer's job foreman. (Tr. 294-295; R Exh. 2.) On cross-examination, Vail denied ever seeing this notice of termination dated October 27. (Tr.131-133, 294-295; R Exh. 2.)

ŕ

D. Vail's Work and Interaction with the Respondent in November—December 2011

Vail admitted receiving delinquent dues notice dated November 1 within the first couple of days in November addressed to him at his Burlingame address from the Respondent indicating that he would be 3 months behind in payment of his union dues if payment was not made by November 15. (Tr. 92-93, 96; GC Exh. 11.)

As stated above, Vail was dispatched to a new job by Mann and worked as a plumber at the F.W. Spencer job at Kaiser Permanente Hospital in Oakland, California, from November 9—28 after which he was laid off on November 29. (Tr. 39-41, 128,143-144; GC Exh. 3.) Vail opined that this was a short call

job of less than 14 days because he missed work over approximately 6 days and he explained that he did not work full days on November 17 and 18 (due to his stepfather's heart attack), November 23 (due to an industrial relations matter), November 24 and 25 (because of Thanksgiving), and November 29 (due an appointment he had at the NLRB). (Tr. 42-43.)

5

Sometime in November, Vail telephoned Mann to wish him a Happy Thanksgiving. (Tr. 239-240.) Mann recalled that in this same conversation with Vail, the two spoke about the charge against the Respondent that Vail had filed. (Tr. 240.) Mann asked Vail why he had filed the charge instead of coming to talk to him first and Mann told Vail that he wished the two could have talked about Vail's concerns beforehand. Infra.

15

10

On November 29, the foreman with F.W. Spencer, however, issued a notice of termination to Vail which states that Vail is not eligible for rehire because Vail had "TOO MANY MISSED DAYS SINCE RE-HIRED, 11/17-11/18, 11/21-23⁶ [and] 11/29." (Tr. 129-131, 161; R Exh. 1.) Vail further explained that his appointment with the NLRB arose from the charge he made over the telephone with the NLRB on November 5 against the Respondent in Case 20-CB-06881 before he attended the November 29 meeting to prepare his affidavit at the NLRB Region 20 San Francisco office. (Tr. 43-46, 109-111, 154; GC Exhs. 4 and 16.)

20

Under long call protocol, Vail was removed from the out-of-work lists in November after his dispatch for work with F.W. Spencer. (Tr. 236-240; GC Exhs. 25 and 36.)

25

On Thursday, December 1, Vail telephoned the Respondent and left a message with its business agent, Mann, telling him that Vail had just been laid off at the F.W. Spencer job at Oakland Kaiser, that Vail had only been out there working the job "a couple days," and that he wanted to know what was going on. Vail also asked Mann to call him back, and Vail said he was upset about the layoff because he was given a "no-rehire." (Tr. 49-50.) Vail explained that he has known Mann for years and that he called Mann because Mann's job for the Respondent involved solving conflicts between union plumber members and the employers where they work. (Tr. 50.) Vail wanted Mann to investigate the allegations that led to the "no rehire" position by F.W. Spencer against Vail. Infra. Vail believed that the "no re-hire" message was undeserved because his last foreman at the F.W. Spencer job was a substitute, Buck, and not Vail's regular foreman, Roberts. Infra.

30

Vail did not hear back from Mann or anyone at the Respondent on December 1. (Tr. 50.)

35

Vail received a suspension notice dated December 1 sometime on December 4 or 5 and the notice references the specific \$50 reinstatement fee but does not contain reference to the total amount owed in arrears though Vail admits he knew of the specific monthly dues amount and that he last paid dues in August. (Tr. 94-95, 96-97; GC Exh. 12.)

40

On Monday, December 5, Vail called again to the Respondent to discuss his layoff and spoke to Zamora, the head secretary at the hiring hall who he has had frequent contact with over the years. (Tr. 51.) At that time, Zamora was the secretary who primarily answered the union telephone. (Tr. 167.) Vail routinely talked to Zamora to verify on Respondent's computer exactly how much money he owed in unpaid union dues his position on the plumbers' out-of-work list and she would pass him through to various Respondent business agents, if available. (Tr. 52-53, 149, 158, 168-169.)

45

⁶ Vail disputes that he missed work on November 21,—23 but later admitted that he missed work on November 23 to go to the Labor Commissioner in San Francisco but did not present any written documentation or file any grievance challenging the missed days of November 21 and 22, 2011, this with the Employer or the Respondent. Tr. 148, 151-153, 158.

On December 5, Vail asked Zamora what number he was on the out-of-work list and she responded by telling him that he was not on the list, and he told her that he was formerly number 2 on the list when he was dispatched to F.W. Spencer at the Oakland Kaiser job in early November. (Tr. 51.) He also told Zamora that he was most recently on a short call job as he was only at the Oakland Kaiser job "a couple days" and asked her why he was not on the out-of-work list. Infra. Zamora responded to Vail by telling him that the only way he could get back on the out-of-work list was to contact Mann. (Tr. 51.)

Vail next telephoned the hiring hall on either Tuesday, December 6, or Thursday, December 8, and spoke to Zamora again. (Tr. 53.) This time, Vail asked Zamora again why he was not on the out-of-work list as he believed that he should be number 2 on the list. (Tr. 53-54.) Zamora told Vail again that he would have to come down to the hiring hall and sign the out-of-work list to get back on it. (Tr. 54.) At the end of their conversation, Zamora put Vail through to Mann's voicemail for him to leave a message. (Tr. 53.)

15

20

10

5

On December 9, Vail finally heard back from Mann after he left him a telephone message early in the morning before the hiring hall opened for Mann to call him. (Tr. 54.) Mann told Vail that the reason Vail was not on the out-of-work list was because he worked more than 14 days on the Oakland Kaiser job so Vail had to go to the bottom of the list. Infra. Mann learned of Vail's layoff from F.W. Spencer in the first week of December and received a copy of the employer's notice of termination to Vail. (Tr. 241; R Exh. 1.) Vail responded to Mann by telling him that he had not worked more than 14 days on the Kaiser job and had only worked "a couple days." Infra. Vail also told Mann that he was number 2 on the list and the Kaiser job was a short call. (Tr. 54-55.) Mann ultimately returned Vail back to the plumbers' out-of-work list after his layoff from the F.W. Spencer job in November. (Tr. 242-245, 271; GC Exh. 37.)

25

On December 9, Vail was added back to the December plumbers' out-of-work list at the hand-written position 3 on instruction from Mann to Zamora though because the plumber in position 1 did not have a social security card at this time, Mann admits that Vail was effectively positioned at number 2 on the list. (Tr. 242-245; GC Exh. 37.)

30

Mann responded to Vail by telling him that he would send Vail out to 2600 Merced Street, the San Leandro Kaiser job, and that Vail should report to Don Gordon at the site trailer on Monday morning, December 12, at 6:30 a.m. (Tr. 55, 246-247; GC Exh. 38.) Mann admits that he crossed out Vail's handwritten name from the December 1 plumbers' out-of-work list because he had just dispatched Vail to the San Leandro Kaiser job believing it to be a long call. (Tr. 286; GC Exh. 27.)

35

A half hour later on December 9 after initially dispatching Vail to the San Leandro Kaiser job, Mann saw on the Union's computer that Vail had been suspended for nonpayment of dues and called Vail again and told him that he cannot send him out to the San Leandro Kaiser job because Vail has been suspended for nonpayment of union dues. (Tr. 55-56, 251-266, 297; GC Exhs. 38 and 39.) Mann also told Vail that Vail owed 3 months in back dues. (Tr. 56.) Vail then responded asking Mann if he could keep the San Leandro Kaiser job if Vail came down to the hiring hall later that day and paid his back dues. Infra. Mann answered Vail by saying, "Yeah, sure, go ahead and do that." (Tr. 56, 133, 287.) Infra. Vail responded "Great." Infra.

45

50

40

After Vail hangs up from talking with Mann, he claims he first realizes that he has no transportation, no car or truck, to get from his home in Burlingame, California, to the hiring hall in Concord, California. (Tr. 56.) Vail estimates that public transportation takes between 3.5 to 6 hours roundtrip. Infra. Vail also was unsure but thought that he might have had some appointment on December 9 that also prevented him from going to the hiring hall to pay his back dues.Infra. Later at

hearing, Vail recalled that he had another meeting at Region 20 of the NLRB on Friday, December 9 regarding a sworn affidavit. (Tr. 57, 61, 133-134, 154.)

5

10

15

20

25

30

35

40

45

Vail tried to call the hiring hall later on December 9 and reached Zamora and informed her that he did not think he was going to be able to pay his back dues in person that day as he had earlier informed Mann and then asked to speak to Mann. (Tr. 56, 133-134.) Zamora responded by saying that Mann had left the hiring hall for the day. Infra. Vail then asks Zamora if she can reach him on his cell phone and she tells him that she would try. Infra.

About 2 or 3 minutes later, Mann calls Vail and Vail informs him that there is no way he can get to the hiring hall that day because he has an appointment in San Francisco involving personal business later in the afternoon. Infra. Vail admits that he could have taken a BART train from the San Francisco Powell St. BART station just outside the door of NLRB Region 20 office to the Concord BART station on December 9. (Tr. 134-135.)

Next, Vail offers to pay his back dues by Tuesday, December 13 and asks Mann if he can still go to the San Leandro Kaiser job Monday morning. (Tr. 56-57.) Mann responds by saying "No, I'm going to send somebody else out there. But you'll be—I'll [Mann will] put you [Vail] back on the list as number two, and you'll be going out very shortly" after Vail paid his dues on December 13. (Tr. 57, 287.) Vail was not allowed the San Leandro Kaiser job dispatch with a start date of December 12 because Vail was suspended for not paying his dues. (Tr. 251-256; GC Exh. 38 at 5.)

Later at hearing, however, Vail's aforementioned testimony changed and he now asserts that Mann also told him that if he could get his back dues paid by Monday, December 12, Vail would be dispatched to the San Leandro Kaiser job as referenced above. (Tr. 57, 135-136.) Mann does not recall saying this to Vail. (Tr. 287.)

Mann next erred by not adding Vail's name back to the out-of-work list when Mann heard that Vail could not pay his dues on December 9 in time to make the expected long call San Leandro Kaiser job dispatch. (Tr. 288.)

Vail then described how he went to a post office on Saturday, December 10 and filled out an overnight delivery envelope⁷ addressed to the Plumbers and Pipefitters Local 342, 935 Detroit Ave., Concord, California, with the proper zip code, and mailed \$120 cash wrapped in white paper marked "union dues" with Vail's union card number to the hiring hall. (Tr. 57-59, 136, 155.) At the time that he mailed the cash, Vail knew the exact dollar amount owed to the Respondent for back dues and fees and he was aware that he was mailing less than the full amount owed as he "was short a couple dollars." (Tr. 59-60.) Vail also explained that he was unable to pay the full \$122 amount so he mailed \$120 as "all the money I [Vail] had to put in there [the envelope to the hiring hall]" on December 10, instead of the full amount owed to the Respondent of \$122 that Vail calculated as 3 months dues at \$24 per month plus the reinstatement fee of \$50.00. (Tr. 59-60, 137, 139.) Vail understood in December that he owed 3 months' dues at \$24 per month plus a \$5-reinstatement fee for a total of \$122 and no more to bring his dues current. (Tr. 148-149.)

Vail never called the hiring hall between December 9 and February 8, 2012, to check to see if they had received his \$120 cash dues payment. (Tr. 138-140, 146.) Vail knew, however, that union dues had increased from \$24 to \$26 per month in January 2012 by reading about it in the Respondent's

⁷ While Vail testified inconsistently that he mailed the envelope both by first-class mail and via overnight mail, I find that he used the overnight mail method based on his overall testimony. Tr. 136-137, 151, 154-155.

monthly journal or newsletter—the Blueprint, while the \$50-reinstatement fee remained unchanged. (Tr. 150-151, 159.) Vail further explained that he was "Flat broke" at all times between December 10 through February 9, 2012, when he received his unemployment check and could not have paid his dues even if he wanted to whether the amount owed was \$122 or more in 2012. (Tr. 155-157.)

5

Vail later signed and filed an amended charge against the Respondent on December 19.8 (Tr. 46-47; GC Exh. 5.)

10

Vail testified that he wrote his return address on the envelope containing his partial cash dues payment and that the envelope was returned to him by mail at his residence at 287 Lowton Ave., #319, Burlingame, California, on December 19 with a black "return to sender" marking on it. (Tr. 62, 137.) Vail claims that he did not retain the envelope for hearing and testified that the envelope was torn up and thrown away after he opened it to find the \$120 cash still in it. (Tr. 63.) After working hours, Vail left a voice message with Mann asking him why Vail's partial dues payment was returned to him and for Mann to call him as soon as possible. (Tr. 61-64.)

15

20

On December 21, Vail telephoned Mann again and he confronted him about his returned partial dues payment. (Tr. 64-65.) Vail explained that Mann asked him what he wanted him to do about the returned partial payment. Infra. Vail responded by asking Mann what he needed to do to return to work at the hiring hall. Infra. Vail recalled that Mann told him that he needed to pay his back dues, the \$50-reinstatement fee, and 3 months' dues in advance. Infra. Mann convincingly denied being responsible for calculating the exact amount of back dues owed and that he would usually obtain such information from Zamora off the Union's computer. (Tr. 293-294.) Vail told Mann that he had never heard of the 3 months' advance dues payment requirement before this conversation with Mann. (Tr. 65.) Mann did not believe he said anything to Vail on December 21 about a 3-month advance dues payment requirement, but Mann did admit that it is his understanding that there is a 3-month advance dues payment requirement in addition to back dues and a reinstatement fee. (Tr. 64-65, 288-290.)

25

30

In response to Mann telling Vail what he needed to pay to return to work, Vail repeatedly told Mann that there was no way that he was going to be able to pay his dues until he received his unemployment check. (Tr. 65-66.) Vail concluded his conversation with Mann on December 21 by asking Mann to investigate with F.W. Spencer the circumstances that led to Vail receiving a "no re-hire" from F.W. Spencer because Buck was only Vail's temporary foreman who did not have a valid basis for the layoff, Vail had only been on the job a few days, and Vail thought his regular foreman, Gary Roberts, would not have laid him off as he thought the job was to last 3 years. (Tr. 67.)

35

Vail received a suspension notice dated January 3, 2012, sometime in early January and the notice references the specific \$50-reinstatement fee but does not contain reference to the total amount owed in arrears. (Tr. 95-96; GC Exh. 13.)

40

Mann retired from the Respondent on January 12, 2012. (Tr. 272.) Kualapai took his place and became a business representative for the Respondent on January 16, 2012. (Tr. 299.)

45

Kualapai recalled that Vail called the hiring hall on January 27, 2012, and a secretary transferred Kualapai to Vail on the telephone. (Tr. 300.) Vail talked to Kualapai about his situation being off the out-of-work list and paying his delinquent union dues. Infra. Kualapai told Vail that he had nothing to do with Vail's earlier dealings with Mann and Kualapai further told Vail that he did not want to be drawn into the

⁸ The charges led to an April 30, 2012 complaint being filed by the Regional Director of Region 20 against the Respondent, which case settled on July 5, 2012. Tr. 47-49; GC Exh. 6.

dispute Vail had with Mann regarding his late dues and/or his position on the out-of-work list. (Tr. 300-301.)

Vail also received a suspension notice dated February 1, 2012, sometime on February 3 or 4, and the notice references the specific \$50-reinstatement fee but also does not contain reference to the total amount owed in arrears for the 6 months' back dues Vail owed. (Tr. 97; GC Exh. 14.)

Vail called the Respondent on February 8, 2012, and spoke to Zamora to inform her that he had received his unemployment check and that he wanted to come to the hiring hall to pay his back dues, sign the out-of-work list, and talk with Mann. (Tr. 68-69.) Zamora told Vail what amount he needed to bring his back dues and fees current and this totaled \$198 as of February 8, 2012.9 (Tr. 74-75.) Zamora instructed Vail that Mann was no longer at the hall but that Vail could meet with new business agent Kualapai to discuss his place on the out-of-work list. (Tr. 69-72.) Vail reminded Zamora that he should remain as number 2 on the out-of-work list and she transferred him to Kualapai on the phone. Infra.

15

20

25

10

5

Vail told Kualapai that he believed he should be number 2 on the out-of-work list and that Mann put Vail in that position. (Tr. 70.) Kualapai told Vail that he did not know anything about it but that he should come down to the hiring hall and sign the out-of-work list after paying his dues. (Tr. 70-73.) Vail told Kualapai what Mann had told him as to the payment requirements of back dues, fee, and 3-month advance dues and Kualapai told Vail that he was only required to pay back dues plus a fee but that he never heard of any requirement to pay 3 months' advance dues. Infra.

Vail mentioned to Kualapai that Mann had agreed that Vail should be number 2 on the list due to his last short call job but Kualapai responded that Mann had retired and was unavailable so Vail should just come to the hiring hall, pay his dues, and he would be number 26 on the list after he signed it as Kualapai had just called 13 guys on the list and they either did not answer or they did not want to go out to work. (Tr. 72-73.) Kualapai told Vail that this meant that Vail would be called to go out to work "real quick." (Tr. 73.)

30

On February 9, 2012, Vail arrived at the hiring hall around lunchtime and was finally able to fully pay his \$148 for 6 months' back dues plus the \$50-reinstatement fee to the Respondent and went to the hiring hall to also sign the out-of-work list. (Tr. 67-68 73-75, 141; GC Exh. 7.)

35

Kualapai believed that Vail called him on Monday, February 13, 2012, to discuss the out-of-work list and the prospect of work for Vail. (Tr. 301.) Kualapai told Vail the Union had some work coming up, hospital work at four ongoing projects and Kualapai described to Vail the union work he anticipated. Id.

40

45

The parties stipulate and I find that Vail's name did not appear on the plumbers' out-of-work lists of December 15, 2011, January 5 and 17, 2012, or February 1, 2012. (Tr. 278-282; GC Exhs. 40-43.) Vail's name appears at the bottom of the Respondent's February 14, 2012 plumbers' out-of-work list at the bottom at position 25. (Tr. 281-282; GC Exh. 44 at 4.)

Kualapai dispatched Vail to a job at Highland Hospital on March 23 to begin on March 26, 2012. (Tr. 302; R. Exh. 3 at 1.) Kualapai saw that Vail had med gas certification and Kualapai needed four of eight plumbers to be certified in med gas for the Highland Hospital job. Infra.

⁹ Vail later denies this happened which I find is not credible based on his earlier testimony. See Tr. 158-159.

ANALYSIS

A. Credibility

My credibility resolutions have been formed by my consideration of a witness' opportunity to be familiar with the subjects covered by the testimony given; established or admitted facts; the impact of bias on the witness' testimony; the quality of the witness' recollection; testimonial consistency; the presence or absence of corroboration; the strength of rebuttal evidence, if any; the weight of the evidence; and witness demeanor while testifying. More detailed discussions of specific credibility resolutions appear in those situations that I perceived to be of particular significance.

There were two primary witnesses in this case—Vail and Mann. Except as noted hereafter, their testimony was mutually corroborative. Vail's demeanor was less serious than Mann's which is consistent with Vail's relevant actions in 2011 as discussed below. I find that Vail never questioned the amount he owed in dues arrearage or fees, his custom and practice was to call Zamora to get exact amounts when he was ready to pay his dues arrearage and fees, and that he consistently stated that regardless of the increasing amount of total dues arrearage owed from December to February 2012, Vail would not make full payment to the Respondent until he received his unemployment check in February when his arrearage approached the 6-month level as it had previously in August.

20

25

5

10

15

Vail's credibility was impeached on a number of occasions such as when he denied ever seeing the October 27 notice of termination slip from another F.W. Spencer job. (See Tr. 131-133, 294-295; R. Exh. 2.) Vail was also not believable when he alleged that Mann called him back after February 8, 2012, though Mann had already retired from the Respondent in early January 2012. I also find unbelievable and reject Vail's changed and unsupported testimony that Mann told him that if he could get his back dues paid by Monday, December 12, Vail would be dispatched to the San Leandro Kaiser job as referenced above. (Tr. 57, 135-136.)

30

35

I also do not believe that Vail was unable to travel to the union hall on December 9 due to a lack of transportation when he was able to travel to downtown San Francisco using the City's BART system that could easily have taken him close to the union hall in Concord, California, that same day. I find that the real reason that Vail did not travel to Concord to pay his union dues arrearage is that he did not want to pay until he once again approached the 6-month arrearage as he had done in August. As a result, I find that Vail's refusal to pay his dues on December 9 was willful and based on his unreasonable view that the Respondent would keep dispatching him to jobs until he reached the 6-month level as he had done in August.

40

In addition, on at least three occasions, Vail called the hiring hall outside of regular business hours which leads me to believe that he really did not intend to correct his union dues arrearage problems in a timely manner. I further find it unbelievable that Vail would not retain the partial union dues mailing envelope and I question whether he really mailed his partial dues arrearage payment to the Respondent on December 10. Nonetheless, it is the fact that Vail knowingly attempted to submit a *partial* dues payment rather than a *full* payment that evidences his cavalier attitude toward the union-security clause and the known consequences for nonpayment of full dues and fee.

45

50

Mann was a credible witness who was entirely convincing as to specific events referenced above and his continued willingness to dispatch Vail to jobs in 2011 until December when he discovered Vail's suspension for failure to pay dues and chose to enforce the Respondent's union-security clause. Mann was also convincing when he thought Vail's November dispatch to Oakland Kaiser was a long call that removed Vail's name from the out-of-work list but for Vail's inability for various reasons to work the job for 14 days. I further find that as to the November Oakland Kaiser job the employer reached its limit and

laid him off on November 29 due to Vail's frequent absences and unreliability.

Mann was also a credible witness who testified with confidence that he remained willing to dispatch Vail to jobs in 2011 despite Vail's numerous work absences and delinquent dues status until December when he decided to enforce the Respondent's union-security provisions. Mann was believable when he mentioned that he instructed Zamora to add Vail's name back to the out-of-work list in early December and this was done once he discovered that Vail's November work at Oakland Kaiser was not a long call dispatch. Moreover, when Mann further discovered that Vail was suspended in December for nonpayment of dues, he stated with confidence that he immediately communicated that Vail could not be dispatched until he brought his dues current. Up until that point, Mann remained willing to work with Vail and actually dispatched him to the San Leandro Kaiser job starting on December 12 if Vail would only bring his dues current at the hiring hall as Vail initially told Mann he would on December 9.

I find that Mann mistakenly told Vail on the phone in late December that in addition to 3 months' dues and the reinstatement fee Vail also needed to pay 3 months in advance. (Tr. 64-65.) Mann's testimony lacked credibility with his denial that on December 21 he told Vail that Vail needed to pay an addition 3 months' dues in advance in addition to payment of his back dues arrearage and fee. While Mann admitted that the 3 months' advance dues payment was what he understood was required, he denied telling Vail this which I reject as untrue. Vail says he told Kualapai that Mann told him he had to pay 3 months' advance dues and Kualapai said he never heard of that as only back dues and a reinstatement fee was required for a return to dispatch. (Tr. 71-72.)

I do not, however, believe this conversation on December 21 had any adverse effect on Vail's employment status and had no effect on Vail's continued nonpayment of dues as Vail admitted that he would not pay his dues until he received his unemployment check which occurred in February 2012 as Vail once again approached the 6-month dues arrearage. Vail never produced any evidence proving that he could and would have paid his full dues arrearage before that time even without the 3-month dues advance portion. While Mann's statement did not affect Vail's dues payment, I find that it was negligent of Mann to advise Vail of the incorrect - month dues advance payment requirement. While this is a second incident of negligence on Mann's part in his interaction with Vail, as stated above, I find it irrelevant to this action and I do not find that the December 21 conversation between the two had any effect on Vail's dues payment timing in February 2012 or his inadvertent removal from the out-of-work list.

35

5

10

15

20

25

30

B. Respondent was not Obliged to Specifically Inform Vail any more than it had of his Dues Obligations, Including the Amount Owed and to Afford Him a Reasonable Opportunity to Satisfy the Obligations Before Refusing to Refer Vail for Employment in December with San Leandro Kaiser

Paragraphs 7 and 8 of the complaint collectively allege that on or about December 9 the Respondent, by Mann, failed and refused to refer Vail to employment for failure to fulfill his financial obligations to Respondent without first providing Vail with notice of the precise amount of monies he owed in delinquent dues and fees and the method by which Vail's financial obligation to Respondent were calculated.

45

50

A union owes its members a duty of fair representation to employees using an exclusive hiring hall. *Breininger v. Sheet Metal Workers*, 493 U.S, 67 (1989); *Radio-Electronics Officers Union*, 306 NLRB 43, 44 (1992). It may not adversely affect the employment status of someone for discriminatory, arbitrary, or irrelevant reasons. *Miranda Fuel Co.*, 140 NLRB 181, 184-195 (1962). Hiring hall rules may be lawful if the action taken was pursuant to a valid union-security clause or necessary to effective

performance of the union's representation function. *Operating Engineers Local 1406 (Ford, Bacon & Davis Construction*), 262 NLRB 50 (1982).

The Board has held that a union's duty of fair representation to its members applies to all union activity, including the operation of a hiring hall. *Plumbers Local 342 (Contra Costa Electric*), 329 NLRB 688 (1999), enf. denied sub nom. *Jacoby v. NLRB*, 233 F.3d 611 (D.C. Cir. 2000). ¹⁰ When a union purposely departs from the rules governing the operation of its hiring hall, it dramatically displays its power to affect an employee's livelihood. Such a deliberate departure constitutes arbitrary, discriminatory, or bad-faith conduct in violation of the duty of fair representation, and violates Section 8(b)(1)(A) and (2), unless the union can demonstrate that the departure was necessary to the effective performance of its representative function. *Plumbers Local 342 (Contra Costa Electric)*, 336 NLRB 549, 550 (2001), enfd. sub nom. *Jacoby v. NLRB*, 325 F.3d 301 (D.C. Cir. 2003); *Operating Engineers Local 406 (Ford, Bacon & Davis Construction*), 262 NLRB 50, 51 (1982), enfd. 701 F.2d 504 (5th Cir. 1983). Thus, a union bears the burden of establishing that its conduct was necessary for effective performance of its representational function. *Teamsters Local 519 (Rust Engineering)*, 276 NLRB 898, 908 (1985), enfd. mem. 843 F.2d 1392 (6th Cir. 1988); *Boilermakers Local 433 (Riley Stoker Corp.)*, 266 NLRB 596 (1983).

Electrical Workers Local16 (ACCL Enterprises), 341 NLRB 28-29 (2004):

A valid union-security clause can be enforced at the hiring hall level by a refusal to refer or dispatch an employee whose dues are in arrears, so long as the employee has already worked for the statutory grace period[11] in the bargaining unit to which the clause applies. *Iron Workers Local 118*, 257 NLRB 564, 566 (1981); *Mayfair Coat & Suit Co.*, 140 NLRB 1333 (1963).

The right of a union to refuse to refer an employee whose dues are in arrears is not unqualified. Thus, in order to seek the discharge of an employee for failing to tender required union dues and fees or, similarly, to not refer or dispatch the employee for that reason, the union normally must, at a minimum, give the employee reasonable notice of the delinquency. This includes stating the precise amount owed, the months for which dues are owed, and the method used to compute the amount; telling the employee when to make required payments; and explaining that failure to pay the required amount will result in discharge (or non-referral). *Communications Workers Local 9509 (Pacific Bell)*, 295 NLRB 196 (1989); *I.B.I. Security, Inc.*, 292 NLRB 648, 649 (1988). The purpose of these requirements is to ensure that "a reasonable employee will not fail to meet his obligation through ignorance or inadvertence, but will do so only as a matter of conscious choice." *Valley Cabinet & Mfg.*, 253 NLRB 98, 108 (1980), quoted with approval in *I.B.I Security*, supra at 649.

Consistent with that purpose, the requirements are not applied mechanically without consideration of the circumstances present in a particular case. Thus, the Board has held that the requirements are not "to be rigidly applied as to permit a recalcitrant employee to profit from his own dereliction in complying with his obligations as a union member." *Auto Workers Local 95*

5

10

15

20

25

30

35

40

¹⁰ In *Jacoby*, supra, the D.C. Circuit disagreed with the Board's application of a unitary duty-of-fair-representation standard to all union activity, holding that unions owe a heightened duty in the operation of an exclusive hiring hall. The Ninth Circuit has agreed with the D.C. Circuit in this regard. *Lucas v. NLRB*, 333 F.3d 927, 934-35 (9th Cir. 2003). I need not decide here which standard should apply because, for reasons explained in this decision, Respondent's negligent actions toward Vail were not deliberately arbitrary, discriminatory, or made in bad faith under either a unitary or a heightened duty standard.

¹¹ Sec. 8(f) of the Act.

(Various Employers), 337 NLRB 237, 240 (2001), citing Teamsters Local 630 (Ralph's Grocery), 209 NLRB 117, 125 (1974); I.B.I Security, supra at 649. The Board will excuse a union's failure to fully comply with the requirements when it is shown that the employee willfully sought to evade his union-security obligations. Auto Workers Local 95, supra at 240; I.B.I Security, supra at 649.

Here, it is undisputed that since 2009, Vail has regularly not kept current with his union dues obligations. This combined with the fact that he has moved his residence without giving timely notice to the Union of his new Burlingame address proves that Vail does not follow union rules or the union-security provisions. Moreover, Vail's willingness to push the envelope with approached expulsion and his willingness to allow his union dues arrearage to increase to almost the 6-month expulsion level both in August 2011 and February 2012 exhibits his stubborn resistance to the Respondent's union-security provisions. As stated above, I find that Vail's refusal to pay his dues on December 9 was willful and based on his unreasonable view that the Respondent would keep dispatching him to jobs until he approached the 6-month level as he had done in August. Finally, Vail's undocumented attempt to pay only a portion of his union dues arrearage in December combined with his lackluster work attendance record in 2011 show that he is a recalcitrant person who willfully sought to evade his union-security obligations unreasonably counting on his continued dispatch and his ability to wait almost 6 months for his next full dues payment.

As stated above, Vail received a suspension notice dated December 1 sometime on December 4 or 5 and the notice references the specific \$50-reinstatement fee but does not contain reference to the total amount owed in arrears though Vail admits he knew of the specific monthly dues amount and that he last paid dues in August. The suspension notices also state that failure to pay back dues and the reinstatement fee will result in ineligibility for dispatch. (Tr. 94-95, 96-97; GC Exh. 12.) I further find that the union-security clause and the consequences for nonpayment of dues were fully known to Vail through the various notices he received and I find that Vail received adequate notice and he was aware and accepted the risk that his dues delinquency could result in his losing job referrals from the Respondent. (See, i.e., GC Exhs. 11 and 12.) I find that Vail made the conscious choice to play fast and loose with his increasing dues arrearage and willfully sought to evade his union-security obligations. Vail lost dispatch opportunities beginning December 9, 2011, for no other reason than his failure to tender uniformly required initiation fees and periodic dues. The fact that the Union chose to enforce its union-security provisions on December 9 after Vail had filed his charge against the Union in early November is mere coincidence and I find that the two events are unrelated.

Alternatively, I further find that the Respondent's action in enforcing its union-security clause was not shown to be arbitrary, discriminatory, or made in bad faith and I further find that Vail's loss of dispatch for his deliberate failure to pay fees and union dues was necessary for the effective performance of the Respondent's function of representing its constituency. It was not shown that Vail failed to meet his obligation through ignorance or inadvertence, but, instead, his failure to pay his dues and fee was a matter of conscious choice. I further find that under the circumstances of this case, the Union did not fail to represent Vail fairly. I further find that the Respondent did not violate Section 8(b)(1)(A) of the Act as alleged in the complaint and that portion of the complaint is dismissed.

C. Respondent did not Unlawfully Remove Vail's Name from its Out-of-Work list in December 2011

Paragraphs 7 and 9 of the complaint further allege that on or about December 9 the Respondent removed Vail from its out-of-work list for violation of its union-security clause and discriminated against Vail in violation of Sections 8(a)(3) and 8(b)(2) of the Act.

As stated above, Mann's usual custom and practice was to ask a secretary to place a member's name back on the out-of-work list if the anticipated long call turned out to be a short call due to layoff which would not require a member's physical presence at the hiring hall to get back on the list. (Tr. 179-180, 270, 273.) In the present case, Mann returned Vail to the out-of-work list in early December when he was made aware that Vail's Oakland Kaiser job referral was a short call. Next, Mann was actually dispatching Vail to the San Leandro Kaiser long call job on December 9 when he later discovered that Vail was suspended for his dues delinquencies. As a result, Vail did not get dispatched to this long call job though Mann afforded Vail the opportunity to do so if he could bring his dues current later on December 9 as the two had agreed. Not until Vail called Mann back on December 9 did Vail lose his San Leandro Kaiser long call dispatch pursuant to the terms of the union-security provisions. Mann next inadvertently omitted Vail from the out-of-work list after Vail informed him that Vail could not bring his dues current on December 9 as previously agreed and attend the San Leandro Kaiser job dispatch the following Monday.

5

10

15

20

25

30

35

40

45

I find that despite Vail's omission from the out-of-work list after losing the San Leandro Kaiser dispatch for delinquent dues his omission was inadvertent as Mann convincingly maintained. Consequently, I further find that Vail's inadvertent omission from the out-of-work list was not purposeful or deliberate by Mann nor was it done with animus toward Vail. It was simply an inadvertent error that is not shown by the preponderance of evidence to be arbitrary, discriminatory, or made in bad faith.

Therefore, by a preponderance of the evidence, I find that Respondent has met its burden of establishing that its omission of Vail from the out-of-work list was an inadvertent mistake. I further find that the Respondent's questioned conduct in this matter was not so far outside a wide range of reasonableness as to be irrational. I further find that Mann's inadvertent omission of Vail from the out-of-work list is unrelated to Vail's filed charge at the NLRB in November. Accordingly, in agreement with the Respondent, I find that Respondent did not violate Sections 8(a)(3) or 8(b)(2) of the Act as alleged in the complaint and those portions of the complaint are dismissed.

Accordingly, I find that the Respondent did not violate Sections 8(a)(3) or 8(b)(1)(A) and (2) of the Act as alleged and the complaint is dismissed in its entirety.

CONCLUSIONS OF LAW

- 1. The Respondent, Local Union 342 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, is a labor organization within the meaning of Section 2(5) of the Act, and an exclusive representative, within the meaning of Section 9(a) of the Act, of a unit of employees of J. W. McClenahan Company, an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.
 - 2. The evidence does not show that the Respondent committed the violations alleged in the complaint.

On these findings of fact and conclusions of law and the entire record, I issue the following recommended 12

¹² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

	Order	
5	The complaint is dismissed.	
	Dated, Washington, D.C. December 14, 2012	
10	_	Canald M. Etakin aham
		Gerald M. Etchingham Administrative Law Judge